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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 22-1076

BENJAMIN CALVIN GODWIN, APPELLANT,

v.

DENIS McDONOUGH,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Senior Judge*.<sup>1</sup>

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

SCHOELEN, *Senior Judge*: The appellant, Benjamin Calvin Godwin, appeals a February 15, 2022, Board of Veterans' Appeals (Board) decision that denied entitlement to an effective date prior to August 3, 2009, for the award of service connection for a traumatic brain injury (TBI) and entitlement to an effective date prior to April 13, 2015, for the award of separate ratings for right upper extremity radiculopathy and left upper extremity radiculopathy.<sup>2</sup> Record of

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<sup>1</sup> Judge Schoelen is a Senior Judge acting in recall status. *In re Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 03-23 (Jan. 3, 2023).

<sup>2</sup> The Board also granted an effective date of June 1, 2006, for the award of a separate rating for left lower extremity radiculopathy; an effective date of November 30, 2004, for the award of separate ratings for left foot and right foot hallux valgus; and an initial rating of 20% effective from March 2, 2006, to April 13, 2015, for lumbosacral strain with degenerative disc disease (DDD). R. at 3. The Court will not disturb these favorable findings. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority."), *aff'd in part and rev'd in part sub nom. Medrano v. Shinseki*, 332 F. App'x 625 (Fed. Cir. 2009).

The Board denied entitlement to an initial rating in excess of 10% for lumbosacral strain with DDD effective prior to March 2, 2006; an initial rating in excess of 40% for lumbosacral strain with DDD, effective as of April 13, 2015; an initial rating in excess of 20% for cervical strain; an initial rating in excess of 40% for right upper extremity radiculopathy; and an initial rating in excess of 30% for left upper extremity radiculopathy. Appellant does not challenge the denial of these claims and has abandoned any appeal of those matters. *See* Appellant's Informal Brief (Br.) at 1; *Pederson v. McDonald*, 27 Vet.App. 276, 281-86 (2015) (en banc).

The Board also remanded claims for entitlement to special monthly compensation based on loss of use of the lower extremities; entitlement to an initial rating in excess of 20% for left lower extremity radiculopathy; and

Proceedings (R.) at 3-37. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a) to review the Board's decision. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board decision.

## **I. BACKGROUND**

The appellant served in the Army from April to June 1967 and from June 1972 to January 1975. R. at 11,878, 11,967.

### *A. TBI*

In July 1975, VA received a statement from the appellant requesting compensation for a head injury. R. at 11,922. On April 30, 1976, the RO denied service connection for residuals of a head injury. R. at 11,601, 11,603-04.

In October 1978, the appellant requested compensation for seizures. R. at 11,513. The RO denied the claim in November 1978. R. at 11,507, 11,509-10. The claim was denied by the Board in January 1982. R. at 10,722-28. In March 1982, the appellant filed a VA Form 1-9 in which he affirmed that he began having seizures after an in-service car accident, but he did not specify what he was appealing. R. at 10,263. This document was marked as a Notice of Disagreement (NOD) by VA that month. *Id.*

According to the record, no further action was taken until the appellant sought to reopen the claim in 1984 and submitted a medical evaluation report. R. at 10,423-28. In July 1985, the RO denied the claim and found that the appellant had not submitted new and material evidence. R. at 10,291. In January 1989, the Board confirmed that the 1982 decision became final and confirmed the RO denial of the 1984 claim. R. at 10,019-28. However, the Board found that the seizure disorder could not be separated from the postservice symptomatology and, based on "a difference of opinion," pursuant to 38 C.F.R. §19.5(b) (1989), the Board administratively granted

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entitlement to an initial compensable rating for bilateral hallux valgus. R. at 4. The Court lacks jurisdiction over these remanded matters. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order).

The Board referred to the regional office (RO) a claim asserting clear and unmistakable error in an April 1976 rating decision that denied service connection for residuals of a head injury. The Court has limited jurisdiction over referred matters and may only determine whether referral versus remand by the Board was the appropriate remedy. *Young v. Shinseki*, 25 Vet.App. 201, 202-03 (2012) (en banc order). The appellant does not present any argument as to the referred matter and the Court deems any appeal of the matter abandoned. *Pederson*, 27 Vet.App. at 281-86.

the claim. R. at 10,027-28. In May 1989, the RO assigned an effective date of February 14, 1984, for service-connected seizures. R. at 9926-27, 10,009-10.

On August 3, 2009, VA received the appellant's request for service connection for TBI. R. at 7671. In July 2011, the RO granted service connection for TBI, effective August 3, 2009. R. at 7239. The appellant filed an appeal, requesting an earlier effective date and alleging that service-connected epilepsy was secondary to TBI. R. at 7189. In a November 2019 Statement of the Case (SOC), VA found that the temporal lobe seizure disorder was not secondary to TBI. R. at 4589.

In April 2020, the Board denied entitlement to an earlier effective date for TBI. R. at 2954, 2956-57. The Board determined that the claim was received on August 3, 2009, and that the record did not reflect any adjudicated TBI claim prior to that date. R. at 2955. The Board found that the appellant was not diagnosed with TBI until many years after service and that the Board was precluded from awarding an earlier effective date. R. at 2957.

In April 2021, the Court vacated the Board decision and remanded the TBI claim. R. at 2167-71. The Court exercised its discretion to remand the claim for the Board to consider in the first instance the appellant's argument that he was not notified of his right to appeal the 1976 rating decision. R. at 2169-70. The Court did not address the merits of the underlying claim for entitlement to an earlier effective date. R. at 2170.

#### *B. Upper Extremity Radiculopathy*

In September 1994, the appellant requested compensation for a slipped disc in the back of the neck, which he asserted came from a fall during a major seizure. R. at 9538. In August 1995, the RO denied the request to reopen a claim for a back and neck condition. R. at 9464, 9466-67. In October 1995, the appellant alleged that he fell down the stairs during a seizure and injured his left shoulder, arm, neck, and upper back. R. at 9458. A November 1995 SOC continued to deny the request to reopen the claim for a neck condition, with pain in arm and shoulder, and a back condition. R. at 9448-57. The appellant perfected his appeal in December 1995 and July 1996. R. at 9361-62, 9428. In April 2003, a VA examiner diagnosed chronic strain of the cervical and lumbosacral spine. R. at 8872-73. In December 2003, the RO granted service connection for cervical strain and for lumbosacral strain, effective September 26, 1994. R. at 8695. The appellant appealed the rating and effective date in February 2004. R. at 8667.

In June 2005, a VA physician opined that the neck pain, bilateral arm pain, and left-sided numbness may be related to DDD. R. at 8489. In June and July 2005, the appellant requested compensation for arthritis and degenerative joint disease of the cervical and lumbar spine. R. at 8477, 8490. In March 2006, a VA examiner diagnosed degenerative bulging disc disease. R. at 8339. In October 2006, a VA physician diagnosed bilateral shoulder pain, likely inflammatory, and found no neurological evidence of acute cervical nerve impingement. R. at 6469-70.

On April 13, 2015, the appellant underwent an examination that revealed radiculopathy of the upper radicular group of both upper extremities.<sup>3</sup> See R. at 5665-66. In February 2016, the RO granted service connection for impairment and radiculopathy of the upper radicular group, of both upper extremities, effective April 13, 2015. R. at 5662. The appellant timely filed an NOD and asserted that he first applied for compensation for the conditions between 2005 and 2008. R. at 5614-15. A February 2020 SOC continued to deny entitlement to an earlier effective date for impairment and radiculopathy of the upper radicular group of both upper extremities. R. at 3123-32. The appellant perfected his appeal to the Board that month. R. at 3047. In April 2020, the Board remanded the claims for entitlement to an earlier effective date for radiculopathy of the upper radicular group of both upper extremities, because those claims were inextricably intertwined with other remanded claims. R. at 2959-61.

### *C. Board Decision on Appeal*

In February 2022, the Board issued the decision on appeal. R. at 3-37. The Board determined that an effective date prior to August 3, 2009, for service connection for TBI was not warranted. R. at 3. The Board found that VA received the original claim on August 3, 2009. R. at 5. The Board acknowledged that the appellant asserted that his service treatment records indicated that he experienced "brain trauma in service" or that TBI was secondarily related to the service-connected seizure disorder. R. at 14-15. The Board also addressed the appellant's assertion that he had not been told of his right to appeal the April 1976 decision denying service connection for a head injury. R. at 15. The Board decided that the weight of the probative evidence was against the claim. *Id.* The Board found that the appellant had been notified of the April 1976 rating decision and that a VA Form 1-4107 explaining his appellate rights was enclosed with the decision, which was mailed to his address of record and not returned to VA. *Id.* Therefore, the Board decided that

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<sup>3</sup> The record of proceedings does not contain the April 2015 medical examination report.

the 1976 decision became final. *Id.* The Board also found that the appellant was not diagnosed with TBI until many years after service. *Id.* Accordingly, the Board concluded that the award of service connection for TBI was effective on August 3, 2009, the date on which the original claim was first received. *Id.*

Additionally, the Board determined that an effective date prior to April 13, 2015, was not warranted for a separate rating for right upper extremity radiculopathy and left upper extremity radiculopathy. R. at 3. The Board found that the original claim for service connection for lumbar and cervical spine conditions was received in May 1990 and that service connection for those conditions was eventually granted, effective September 26, 1994, "the date of receipt of his application to reopen such claims." R. at 11. Following an appeal of the decision that had granted service connection for the lumbar and cervical spine conditions, the RO granted service connection for bilateral upper extremity radiculopathy and awarded an effective date of April 13, 2015, "the date entitlement arose as demonstrated by a VA examination conducted on such date." *Id.* The Board found that September 26, 1994, was the date of the claims for the lumbar and cervical spine conditions and that right and left upper extremity radiculopathy stemmed from those conditions. *Id.* However, the Board decided that, prior to April 13, 2015, it was not factually ascertainable that the appellant had bilateral upper extremity radiculopathy associated with a cervical spine disability. R. at 5. On April 13, 2015, the record for the first time contained objective evidence of radiculopathy. R. at 12. The Board detailed medical records from 2003, 2005, 2006, and 2010 to support its findings. *Id.* This appeal followed.

## II. ANALYSIS

"[T]he effective date of an award based on an initial claim . . . of compensation . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a). The Board's determination of the proper effective date for a grant of service connection, including whether the claimant filed an informal claim, is a finding of fact that the Court reviews under the "clearly erroneous" standard set forth in 38 U.S.C. § 7261(a)(4). *Evans v. West*, 12 Vet.App. 396, 401 (1999); *Hanson v. Brown*, 9 Vet.App. 29, 32 (1996). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v.*

*United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). As with any finding on a material issue of fact and law presented on the record, the Board must support its effective-date determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

*A. Entitlement to an Earlier Effective Date for TBI*

The appellant contends that the Board erred because his 1975 claim for compensation for a head injury should have encompassed TBI and was filed within 1 year of his discharge from service. Appellant's Br. at 1-2. The Secretary responds that the Board did not err in finding that the 2009 claim was an original claim, not a reopened claim, and that the August 3, 2009, effective date was therefore correct. Secretary's Br. at 11-12.

In the decision on appeal here, the Board stated that its 2020 decision included the finding that August 3, 2009, was the appropriate effective date, because that was the date the claim was received. R. at 14-15. The Board noted the appellant's argument that he had experienced brain trauma in service and that he had argued that his TBI was secondary to service-connected temporal lobe seizure disorder. *Id.* But the Board found that the appellant was not diagnosed with a TBI until "many years following service." R. at 15. Because the original claim for TBI was received on August 3, 2009, the Board concluded that that was the appropriate effective date. *Id.*

The Board also considered, as ordered by the Court in its 2021 memorandum decision, whether the appellant was properly notified of his right to appeal the 1976 rating decision denying service connection for a head injury. R. at 15. And, as the Secretary asserts, the Board did discuss whether the 2009 claim for TBI was an original claim or a reopened claim and the effect of that finding on the assignment of an effective date. *Id.* The Board substantially complied with the prior remand directive from the 2021 memorandum decision and there is no error in this regard. *See Dymment v. West*, 13 Vet.App. 141, 146-47 (1999).

To any degree that the appellant's argument can be interpreted as a dispute with the Board's consideration whether his seizure disorder claim encompassed a claim for TBI, the Court holds that the appellant has not met his burden to support this argument. *Mayfield v. Nicholson*, 19 Vet.App. 103, 111 (2005) ("[E]very appellant must carry the general burden of persuasion regarding contentions of error."), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) ("An appellant bears the burden of persuasion on appeals to

this Court."); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) ("[T]he appellant . . . always bears the burden of persuasion on appeals to this Court."). Though the pro se appellant is entitled to sympathetic reading of his arguments, he has not sufficiently supported his argument for the Court to ascertain the purported error in the Board decision regarding the scope of the claim. *See Gomez v. McDonald*, 28 Vet.App. 39, 43 n.1 (2015); *Clemons v. Shinseki*, 23 Vet. App. 1 (2009) (holding that when a claimant requests benefits, he is seeking service connection for symptoms regardless of how those symptoms are diagnosed or labeled); *Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments).

*B. Entitlement to an Earlier Effective Date for Upper Extremity Radiculopathy*

The appellant argues that the Board erred because he filed a claim for radiculopathy of the upper extremities "years before [April 13, 2015]." Appellant's Informal Br. at 1. The Secretary concedes that the claims filed in 1994 remained pending until the 2003 rating decision, which awarded service connection for lumbar and cervical strain, effective September 26, 1994. Secretary's Br. at 7. However, the Secretary maintains that the Board properly found that the later of the date of filing or the date entitlement arose, pursuant to 38 C.F.R. § 3.400, was April 13, 2015, because that was when radiculopathy was first objectively demonstrated. *Id.* at 19-22. The Secretary argues that the appellant does not demonstrate error, because there are no documents in the record demonstrating radiculopathy prior to April 13, 2015, and therefore entitlement did not arise prior to that date. *Id.* at 20-21.

As the Board clearly explained, the appellant has never expressly or implicitly filed a claim for upper extremity radiculopathy. R. at 5. Further, the Board explained that the initial claims were for lumbar and cervical spine disorders and filed on September 26, 1994. R. at 11. The Board found that the record contains no objective evidence of radiculopathy of the upper extremities prior to April 13, 2015, the date of the VA examination. R. at 12. Accordingly, the Board found that the effective date is based on the date of the examination, the earliest proof of the condition. R. at 13.

The Court sees no clear error in the Board's finding. Though the appellant asserts that he was diagnosed with and filed claims for upper-extremity radiculopathy prior to April 2015, Appellant's Informal Br. at 1, the record does not support his contention that he requested compensation for this condition at any time. The appellant does not point to any evidence that supports an award of an effective date prior to April 13, 2015. The appellant has not satisfied his burden of persuasion on appeal. *Mayfield*, 19 Vet.App. at 111; *Hilkert*, 12 Vet.App. at 151; *Berger*,

10 Vet.App. at 169. Though the 2005 medical evidence mentions left-sided numbness, the Board determined that this evidence did not support the manifestation of radiculopathy at that time and that the assessment was based only on subjective reports of symptoms. R. at 12. Further, the Board discussed evidence denying the presence of radiculopathy in 2003, 2006, and 2010. *Id.* Accordingly, there is no clear error in the Board's finding that the first objective evidence of radiculopathy of the upper extremities was on the April 13, 2015, examination, and the Court affirms the decision as to this claim.

### **III. CONCLUSION**

After consideration of the foregoing, the February 15, 2022, Board decision is AFFIRMED.

DATED: April 21, 2023

Copies to:

Benjamin Calvin Godwin

VA General Counsel (027)